APPENDIX.

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE.

September Term—1940. January Call—1941.

No. 37,173.* 147 S. W. (2nd) 644.

CHARLES WYERS, *Appellant,*

v.

GLENDY B. ARNOLD, Judge of the Probate Court of the City of St. Louis, Missouri, *Respondent.*

The ultimate question for decision is whether the Treaty between the United States and Germany, although containing no express provision on the point, is to be construed as superseding the Statute of this State which limits the time within which a will may be admitted to probate.

The question arises in this way. In the early part of 1931 Dr. Carl Orth of St. Louis died intestate. One of Dr. Orth's heirs was his sister, Babette Orth, who resided in Germany. On October 22, 1931, and before receiving distribution from Dr. Orth's estate, Babette Orth died. It is her estate here which is involved in this case. On November 23, 1931, the probate court for the City of St. Louis appointed George Wyers, a nephew, the administrator of her estate. In due course the estate of Dr. Orth was closed and the share of Babette Orth, amounting to some $40,000, was paid to her administrator who now holds her estate. On April 25, 1935, more than three years after this administration was begun, a copy of the will of Babette Orth, executed in Germany, was presented to the St. Louis Probate Court with a petition stating that the will was valid under the laws of Germany where it was admitted to probate and was in force and effect. The petition further prayed that the entire estate here be turned over to the persons named in the will, three nephews named Kachel, all residing in Germany, as Babette Orth's sole legatees. On January 28,

1936, more than four years after the administration was commenced, a properly authenticated copy of Babette Orth's will together with its proof in Germany was admitted to probate by respondent probate judge.

Thereupon plaintiff, a nephew and heir at law of Babette Orth, but cut out by the will, applied to the St. Louis Circuit Court for a writ of prohibition against the probate judge to prevent him from proceeding under the will, and distributing the estate according to its terms on the ground of Section 532, R. S. 1939, Mo. St. Ann., Sec. 531, p. 324, which bars the probate of a will after the lapse of one year from the date of the first publication of the notice of the granting of letters testamentary on the estate of the testator. The respondent set out in his return that the will was valid under the laws of Germany and consequently was valid for the purpose of passing title to any personalty of the testatrix located in this country; that by the terms of the will the nephews Kachel were entitled to her estate; and that he was bound by the Treaty with Germany to admit the will to probate and was therefore acting within his jurisdiction. The circuit court denied the application for the writ and plaintiff has appealed. No contention has been made about the statute being inapplicable except for the Treaty.

At the outset it is important to bear in mind the character of this proceeding which raises only the question of the jurisdiction of the probate court in the premise. While our decision may, incidentally, dispose of the controversy between the heirs, that is, should the nephews Kachel of Germany receive the entire estate as sole legatees under the will, or should they share the estate with the Nephews Wyers, residing here, and others of the half blood residing in Germany, under the intestacy laws of Germany; still we are not primarily concerned with these conflicting claims to ownership of the assets of the estate. Some of the cases cited to us are equitable proceedings to adjudge conflicting claims of a somewhat similar nature and cover a wide and inviting field; but this proceeding is confined within the narrow channels which restrict the office of the writ of prohibition as developed from the common law. Our decisions indicate that we regard the remedy by prohibition as preventive, not as corrective. State ex rel. McNames *v.* Stobie, 194 Mo. 14, 92 S. W. 191.

State laws, of course, must yield to valid treaties where there is conflict between them. Article VI., Section 2 of the Federal Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land. Even laws governing essentially local matters must bow when treaty provisions override them. Santovincenzo *v.* Egan, 284 U. S. 30, has held that the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of the treaty-making power, and any conflicting law of the State must yield. This case is looked upon as setting at rest any conflict of decision whether the treaty-making power could constitutionally supplant or qualify the state laws regulating the administration of estates. Lily *v.* Kalingoglu, 64 App. D. C. 213, 76 Fed. (2d) 983. In United States *v.* Belmont, 301 U. S. 324 the Court declared the external powers of the United States are to be exercised without regard to state laws or policies and state constitutions, laws and policies cannot be interposed as an obstacle to the effective operation of such powers.

The Virginia Statute of Limitations was held to be suspended by the Treaty of Peace with his Brittanic Majesty in 1782 but there the treaty specifically ordained that a creditor should meet "with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted." The Statute of Limitations was directly in conflict with this provision and for that reason could not be interposed as a defense to the debt. Hopkirk *v.* Bell, 3 Cranch 454, 2 L. Ed. 497.

It appears to be the declared policy of Missouri to recognize, as it must, the supremacy of valid treaties. We find this in the statute prohibiting aliens from acquiring land by purchase (although they may lawfully acquire it by devise or descent). There it is stated that "the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries." Sec. 15,230 R. S. 1939, Mo. St. Ann. Sec. 14,013, p. 549.

Turning now to the Treaty with Germany of October 14, 1925 (44 Stats.-at-large, Vol. 3, p. 2132) we find the provision relied upon by respondent under Article IV. It

follows: "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

The laws of this State permitting the right of disposal of the personal estate of a foreigner are in harmony with this provision. See Section 253, R. S. 1939, Mo. St. Ann. Sec. 254, p. 164.

Now, may it be said that the *full* power of disposition of personal property by testament as guaranteed by the treaty is improperly denied by our statute which limits the time within which probate may be had?

Respondent concedes the will was not presented to him within the time required by the statute but he defends his action in admitting the will to probate on the ground the statute does not apply to a German citizen because of the treaty. He argues that "full power" to dispose of property by testament includes the "full power" to probate the testament and the statute in question restricts or limits such grant of full power by the treaty and therefore the statute may not be heeded.

Much stress is laid on the statement of Chief Justice Hughes in the case of Santovincenzo *v.* Egan, *supra*, where he discusses the Treaty with Persia and observes that there was omitted from that treaty such qualifying phrases as "conformably with the laws of the country" or "so far as the laws of each country will permit." * * * "The omission of a clause of this sort" he says, "must be regarded as deliberate." With this conclusion we fully agree and find it essentially applicable to this case. The purpose of the provision under consideration was to insure the right of disposition of personal property *despite* any local law to the contrary and had such a phrase been included in the

treaty such right would have been expressly subject to denial by the laws of either country and the treaty provision would *me* meaningless.

In determining this case we must adhere to the principle that generally treaties are to be liberally construed and their words are to be taken in their ordinary meaning and not in any special or restricted sense. All provisions of the treaty relevant to the inquiry are to be considered. Even so, treaties will be construed, wherever reasonable possible, so as not to override state laws or to impair rights arising under them. Guaranty Trust Co. v. United States, 304 U. S. 126.

In granting the power to dispose of personal property by testament certain considerations must necessarily have been within the contemplation of the parties to the treaty because of the use of the word "testament." According to some authorities a testament, in its strict sense, is a will of personal property. In the first place the right to dispose of or take property under a will is not a natural right but is a purely statutory one. It is subject to the regulation and control of the sovereign power. The property involved may be and often is, as here, subject to the control of a power foreign to the one which controls the will. For an instrument to constitute a will or testament it must be drawn and executed in conformity with legal requirements. A testament must be probated to give it life and force. The probate of a will is likewise a judicial act. *Stevens* v. *Oliver,* 200 Mo. 492, 98 S. W. 492. In order to probate a will resort must be had to a tribunal authorized for that purpose. After probate, the administration of an estate under a will becomes a judicial proceeding. All of these well-understood fundamental processes are necessarily associated with and carry into operation the power of disposal by testament and all are regulated by statute law.

Can we then say that a local law tending toward the orderly administration of estates which applies alike to citizen and foreigner is an unwarranted restriction of this power to dispose by testament? The answer must be in the negative because the treaty itself provides for submission to local laws in the courts of the respective countries. Article I, among other matters, states that "the nationals

of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other *On conforming to the local laws*, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (Our italics.) It has been held that even a foreign sovereign seeking a remedy in a court of this country is subject to the limitation statutes of the forum. *Guaranty Trust Co.* v. *United States, supra.*

Certain rights are conferred by the treaty upon consular officers in relation to estates if under the local laws such an officer is eligible to exercise them. Article XXIV authorizes a consular officer to take charge of and protect the property of a deceased national pending the appointment of an administrator if the local laws permit. Furthermore, a consular officer may be appointed administrator if qualified according to the local laws. Should he accept such an appointment "he subjects himself as such to the jurisdiction of the tribunal or other agency making the appointment for all necessary purposes to the same extent as a national of the country where he was appointed."

We believe the provision for notice in the same section of the treaty is of importance in sustaining our view that the submission to local laws of procedure was contemplated. The treaty provides when a national dies in a foreign territory without having in the territory of his decease any known heirs or testamentary executors the consular officer shall be notified "in order that necessary information may be forwarded to the parties interested."

In the present case, who is to determine how long administration should be prolonged awaiting the possibility that at some time in the future a will might be presented for probate? No duty of searching in a foreign jurisdiction for a possible will is placed upon anyone either by the treaty or by statute. If the local laws for orderly administration were not observed, confusion would ensue. One of the objects of administration is an orderly settlement of the deceased's affairs and the protection and lawful distribution of his property within a reasonable length of time.

The case of *Todok* v. *Union State Bank*, 281 U. S. 449,

74 L. Ed. 956 is apposite. The controversy there was whether the Treaty with Sweden and Norway providing that national "may freely dispose of their goods and effect" superseded the law of Nebraska which required a wife to join with her husband where the homestead was conveyed. It is argued that the local law could not be applied where a husband, a citizen of Norway, conveyed a Nebraska homestead by his sole deed because such local law constituted an unlawful limitation on his right of free disposal saved to him by the treaty. The court first observed that to sustain this argument would place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the State, which would be repugnant to the purpose of the treaty. Construing the treaty, the court said: "It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of the country of location, bearing upon aliens and citizens alike. For example, conveyance of land would still be subject to non-discriminatory provisions as to form or recording. Nor can the right to 'dispose,' secured by the treaty, be deemed to give a wholly unrestricted right to the alien to acquire property, without regard to reasonable requirements relating to particular kinds of property and imposed upon both aliens and citizens without discrimination."

On the question before us a New York Surrogate said: "Even when movable property passes according (to) the law of the foreign domicile of its some time owner, all the procedure for taking it into legal possession here for the purpose of surrendering it for transmission abroad, after local claims thereon have been satisfied, is the procedure of the local tribunal, modelled after that followed in merely domestic cases." In re Hanson's Estate, 281 N. Y. S. 617.

We conclude that our statute limiting the time for the probate of a will, a reasonable rule which does not discriminate between residents and non-residents, does not conflict with the Treaty with Germany. It does not unlawfully limit or restrict the freedom of disposal by testa-

ment. Consequently, it is not superseded by the treaty.

The statute is mandatory on respondent and in proceeding contrary to its express prohibition, he acted without authority and in excess of his jurisdiction.

We need not consider other matters raised in the arguments.

The judgment is reversed and the cause remanded with directions to make the writ of prohibition absolute.

All concur.

JAMES M. DOUGLAS,
Judge.

Memorandum of Court.

In the Matter of the Estate of Babette Orth, Deceased,
No. 74,351

There are two petitions before the Court in this estate, one of which will be referred to as the petition of the heirs and the other as the petition of the legatees.

The deceased died in Germany on the 22nd day of October, 1931. She was a native and domiciled in that country, at the date of her death, and apparently was never domiciled in this state, or in the United States. On the 23rd day of November, 1931, letters of administration were granted by this Court upon her estate, which appears to have come to her from the estate of a brother, a resident of this city, who predeceased her shortly before her death.

The petition of the heirs is presented by Charles and Albert Wyers, Franz and Ernst Leininger, and Augusta Feineis, and prays to have themselves, together with George J. Wyers, administrator of the estate, and Franz, Alfred and Gustav Kachel, declared to be heirs-at-law, according to the laws of Germany, and entitled to distribution of the estate of the deceased. The estate is now ready for final settlement and distribution.

As all of the persons named in the petition of the heirs, as heirs of the deceased, are listed as her heirs in the verified application of the administrator for his letters of administration, it seems that this petition is unnecessary. The persons therein named are now shown by the records of this court to be the sole heirs—as distinguished from the lega-

tees—of the deceased, and there is no denial of that fact, or contention to the contrary.

The petition of the legatees was filed in this court, April 25, 1935, and seeks to have the entire estate distributed to Franz, Alfred, and Gustav Kachel, the petitioners, as legatees named in the will of the deceased, which was admitted to probate according to the laws of her domicile. These petitioners have filed a copy of the will in the German language, duly authenticated according to the laws of the domicile of the testatrix. It shows that the legatee petitioners are the sole legatees of the testatrix, and that each is bequeathed an undivided one-third interest of her estate, said to be of the value of $38,942.62. No mention, however, is made in the will of any estate of the deceased located here or elsewhere.

The petition of the legatees requests the Court to adopt the anomalous procedure of directing the distribution of the assets of the estate to those named in the will, as legatees, without first having the will admitted to probate by this court. To grant this request would have the effect of administering the will, of this non-resident testatrix, without having it admitted to probate, in accordance with the administration laws of this state. No authority is cited for that procedure, and it appears to be directly contrary to the laws of this state. Farris *v.* Buchard, 242 Mo. 1; Graham *v.* Graham, 297 Mo. 290—"A will takes its validity from its probate"—Woerner on Administration, pp. 701, 773. I think that rule applies to wills of non-residents where the legatees thereof seek distribution to themselves of the personal property of the deceased, which is being administered upon in this court.

The heirs assert title to the estate under the inheritance laws of Germany, the legatees under a will of the deceased. This Court has jurisdiction to adjudge who are the heirs, but not of the conflicting claims of ownership to assets of the estate, except as provided in section 67 et seq. of the statutes. The request for distribution under the will, without probate, against the claims of admitted heirs, presents a controversy over which the Court has no jurisdiction. McClure *v.* Baker, 216 S. W. 1018.

Yielding to these views, the legatees have filed an amended

petition praying for probate of the will and distribution of the estate in accordance with its provisions, and in support thereof submit the proofs accompanying their original petition, together with the exhibits attached. The heirs have filed their written objection to the probate of the will, but no objection is made that the will is not valid under the laws of Germany, nor that it has not been duly and legally probated in that country. In fact, the heirs admit that the will is legal under the laws of Germany, but they assert that it is illegal under the laws of this state. The laws of this state do not require the wills of non-residents, disposing of personal property here, to be executed according to the laws of this state. If they are valid under the laws of the domicile of the testator, such wills are valid here.

The principal objection of the heirs to the probate of the will is that it is barred by the one year statute of limitation, contained in section 531 of our statutes. The record shows that the will was not presented for probate within the time required by that statute. However, the legatees call the Court's attention to the provisions of an existing treaty between the United States and Germany, which was in force before and at the time of the death of the testatrix, the applicable provisions of which read as follows:

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves of by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territory such property may be or belong shall be liable to pay in like cases."

The laws of this state favor the testamentary disposition of the personal property here of non-resident decedents, and under this will, valid under the laws of the domicile of the testatrix, the title to the assets of this estate is now vested in her legatees. Is the probate of the will barred by

the one year statute of limitation? The correct answer to that question depends upon whether or not that limitation cuts down or impairs the rights given by the treaty to the testatrix and her legatees. If so, then the limitation must yield to the treaty. Santovincinzo *v.* Egan 284 U. S. 30, 40.

The treaty must be construed according to its plain meaning, unless such a construction leads to absurd results, or is obviously contrary to the plain intent of the parties thereto, as evidenced by its context. Geofroy *v.* Riggs, 133 U. S. 258, 271. Applying this rule here, we are not authorized to read into the treaty a limitation which is not there by necessary or plain implication. No express limitation upon the power to make wills or to probate them in either country, is contained in the treaty. As said in Santovincinzo *v.* Egan, supra, this treaty "does not contain the qualifying words 'conformably with the laws of the country' * * * or the phrase 'so far as the laws of each country will permit.' * * * The omission * * * of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate." So it is with the treaty here.

Turning to the language of the treaty, it, in express terms gave this testatrix "full power" to dispose of this estate by will, valid according to the laws of Germany. It also, in express terms, grants to her legatees the right to take possession of her property, which now constitutes the assets of this estate, and to dispose of the same, subject to certain duties and charges. "Full power" to dispose of this estate by will necessarily includes "full power" to probate the will, if probate is necessary, as I believe it is in this case, to effect testamentary disposition of the estate. The right to probate the will may, therefore, be deemed to be within the grant of this treaty.

It will be observed that the treaty granted "full power" to this testatrix to make testamentary disposition of this estate. The use of the words "full power" is significant and important. Those words have been construed by the Supreme Court of the United States and the Supreme Court of Maryland. They were used in a grant of legislative power by the Constitution of Florida, and were defined by the Supreme Court of the United States as follows: "It says that the power shall be 'full power' and the adjective

may be read as meaning a power which cannot be cut down." Tampa Water Works Co. *v.* Tampa, 199 U. S. 241. In construing those words in a law of Maryland, the Supreme Court of that state said: "Full power does not mean conditional power." Mayor of Baltimore *v.* Flack, 64 Atl. 702, 708. Paraphrasing the argument in that case, discussing the words "full power": If the term "full power" were construed to be synonymous with limited or conditional power, then the plenary power conferred by the treaty upon the testatrix would be narrowed down to a restricted power to be exercised in subordination to our local limitation statute, though the contrary is to be implied from the deliberate omission of language from the treaty to that effect. Santovincinzo *v.* Egan, supra.

There is another strong reason why this treaty should not be construed as subjecting the right to probate this will to this one-year statute of limitation. It is elemental, that a general law of a state or of the United States must have a uniform interpretation and operation. The uniform operation required does not mean universal operation. "A general law may be constitutional and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But, so far as it is operative, its burdens and its benefits must bear alike upon all persons and things upon which it does operate." Northern Pac. R. Co. *v.* Barnes, 51 N. W. 386, 2 N. D. 310, 341; 59 C. J., sec. 309, p. 722. This treaty is a general law of the United States and must be given a general and uniform interpretation and operation in all of the states. Wiese *v.* Wiemer, 279 U. S. 333; Calhoun Co. *v.* Ajax Co., 182 U. S. 499; Eagan *v.* Commissioner, etc., 43 Fed. (2d) 881.

In the United States, administration is almost invariably required to effect a lawful disposition of the personal estates of deceased persons, and when such disposition is testamentary, probate of the will is usually necessary. In the several states of the Union, the time in which probate is required is not uniform, but varies from one year, as in this state, to fifty years in other states after the death of the testator. Woerner on Administration, p. 704, et seq. In some states there is no limitation at all. Of course, there is no federal law on the subject.

As there is no uniform limitation of time in the several states in which wills must be probated, it follows that to permit the probate of a will, executed under the authority of this treaty, in one state and bar its probate in other states, on account of the mere lapse of time, would be to construe the treaty as granting different rights in the different states. The rights granted by the treaty ought to be held to be the same in all of the states, otherwise the treaty is not the supreme law of the land.

It is said that to construe this treaty as giving the legatees the right to probate this will, in the face of our one-year statute of limitation, is to give aliens rights superior to the rights of citizens of Missouri. Generally, that construction is to be avoided, Todok *v.* Union Bank, 281 U. S. 449, 455, but may not be avoided where the language of the treaty makes that impossible. Santovincinzo *v.* Eagan, supra. In the Todok case, it was held that, "treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government" (l. c. 455). A power which is necessarily implied from the language of the treaty is deemed to be expressly granted.

I am referred, by counsel for the heirs, to the case of Vogel *v.* New York Life Ins. Co., 55 Fed. (2d) 205, as authority supporting his contention. There does not appear to be any rule in that case contrary to the conclusion reached here. On the other hand, there are a number of principles announced there which have the direct effect of supporting the probate of this will, some of which will be quoted, to-wit:

"The duly certified exemplification showing the making and filing of the German will and its opening in court resembling a probate in common form here, and administration founded thereon, is entitled to faith and credit here; Germany extending such faith and credit to our like proceedings (citing cases)" (l. c. 209).

In speaking of the language of the treaty relied upon here, the court in that case said:

"We think this provision was intended to be retroactive over the period of the war, and to apply to wills then made. It certainly applies to the taking possession or other disposition since the date of the treaty of personal property in the United States bequeathed by a German will. A fair interpretation of the treaty requires the recognition as valid of the will of a German established as valid in Germany, and of the proceedings thereunder disposing of personal property here" (l. c. 209).

If I had jurisdiction between claimants to personal property in the possession of an administrator, appointed by me, then under the authority of the above case, I could recognize this will, and distribute the assets of this estate in accordance with its provisions, without its being admitted to probate. I have shown that this Court is without such jurisdiction.

There is a direct implication against the contention of the petitioning heirs in the following language, and which sustains the conclusion which I have reached, that I cannot recognize this will without its being admitted to probate:

"We perceive no need for the assignee to probate the German will in New York, since no administration is there sought" (l. c. 209).

What would that court have said if there had been administration on the estate of the German in New York? Might that court not have held that the probate of the will in New York was necessary?

In that case, there was no ruling upholding the rejection of the German will by the Probate Court in Texas, on the ground that it was barred by the four-year statute of limitation of that state. This fact is shown by the following language of the court, to-wit:

"That the German will has not been and cannot be probated in Texas, and that another will with a different executrix has been established there have no materiality in this case, because Texas was not the domicile at death of the testator, and the property here in dispute was not assets there for administration" (l. c. 208).

Further:

"But as will be shown, the present issue is not the provability of the will in Texas but its validity elsewhere," etc.

It further appears from the opinion in that case that the court was unable to determine whether the will was rejected by the Texas Probate Court because of the four-year limitation against its probate, or want of testamentary capacity of the testator (l. c. 207, 208).

The petition of the legatees will be granted and the will admitted to probate.

Glendy B. Arnold, Judge.

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